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No. 03-6696

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
Petitioners,

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Because of concerns about the separation of powers, the Fourth Circuit has refused to conduct any meaningful review of the military's indefinite detention of an American citizen who is being held effectively incommunicado. This remarkable holding implicates the basic meaning of the rule of law.

Petitioner Yaser Hamdi, an American citizen currently imprisoned in a South Carolina brig, has been detained for more than two years by the military. On the basis of no more than their own unilateral statement that Mr. Hamdi is an "enemy combatant," the military has thus far successfully asserted the right to imprison him indefinitely and deny him access to the civil courts in operation a short distance away.

Encouraged by the Court of Appeals' ruling, Respondents continue to assert that their unilateral factual determination that Petitioner is an "enemy combatant" is the first and final word

regarding the legality of Mr. Hamdi's imprisonment. (Br. in Opp. 16-18, 18 n.7, 21.) According to Respondents, because alleged enemy combatants of any stripe may be denied a due process right to be heard in accordance with statutorily prescribed procedures, *see* 28 U.S.C. §§ 2241, 2243, 2246, American citizens unilaterally classified as enemy combatants may be denied these rights as well.

These arguments turn the separation of powers on its head. Indeed, the Court of Appeals' decision is inconsistent with the very design of the federal government "into distinct and separate departments" as a "security . . . to the rights of the people." The Federalist No. 51. By permitting the military to act as the judge of its own cause, the decision below has emboldened the Executive branch, weakened the judiciary, and threatened the elemental constitutional protections of the citizen. If left unreviewed by this Court, the Fourth Circuit's decision will mark a new and unrestrained Executive power entirely contrary to the Constitution and the careful limitation drawn by Congress on the Executive's ability to detain American citizens without charges or access to counsel.

While Respondents ostensibly agree that judicial review is constitutionally required, (Br. in Opp. 15), they only allow for a review that would permit the judiciary to do nothing more than rubber-stamp the Executive branch's classification of Petitioner as an enemy combatant. *Id.* at 17. In short, Respondents rely on their own designation of Mr. Hamdi as an enemy combatant to circumscribe the very proceedings designed to review that designation. Dissenting from the denial of rehearing below, Judge Motz aptly described such reasoning as "dizzyingly circular." (Pet. App. 63a n.1) (Motz, J., dissenting from denial of rehearing).

The questions raised by the Petition are not about the rights of a citizen who is acknowledged to be an enemy soldier. They are about the right of an American citizen who has been called an enemy combatant to challenge that classification in an independent forum. Review by this Court is

essential to confirm—within the Fourth Circuit[1] and elsewhere—that our system of divided government is one in which the power to indefinitely detain is separated from the power to judge, in a forum governed by due process, whether that indefinite detention is lawful. Respondents' arguments do not obviate the extraordinary need for this Court to address the fundamental issues raised by this case.

I. This Case Presents Issues of National Importance

Because Mr. Hamdi was purportedly seized within an undefined "zone of active combat" and because Respondents have represented that Petitioner is an "enemy combatant" based on facts set forth in a hearsay declaration by government bureaucrat Michael Mobbs, the Fourth Circuit held that "further judicial inquiry [into the propriety of Mr. Hamdi's detention is] unwarranted." (Pet. App. 27a.) As the Petition explains (at 14-19), the Fourth Circuit's failure to define what constitutes a "zone of active combat," as well as its refusal to permit a challenge to the Executive branch's factual allegations underlying the determination that Mr. Hamdi is an "enemy combatant," sanction a virtually unconfined power by the Executive branch to imprison citizens indefinitely without formal charge, access to counsel, or the ability to be heard.[2]

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[1] As noted in the Petition, (Pet. 13 n.9), the government is holding all three alleged "enemy combatants" within the United States at a special facility in South Carolina constructed for that purpose.

[2] The Fourth Circuit's holding that Petitioner could not challenge the facts upon which his detention is based effectively eliminated any litigation-related basis for communication between counsel and Petitioner. Accordingly, the recent decision by the Department of Defense—one day before the Brief in Opposition in this case was due—to permit counsel to have access to Petitioner, (Br. in Opp. 25-26 n.11), highlights the errors worked by the Fourth Circuit's premature resolution of this case. Even now that the Defense Department has agreed to allow Mr. Hamdi to meet with counsel, the Fourth Circuit's ruling leaves no room for Petitioner to participate in his habeas corpus proceeding even if such access had been allowed from the outset. Respondents, it is worth noting, pointedly do not suggest that the DOD's decision moots any issues in this case. *Cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 & n. 10 (1982) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he

Respondents' sole response to the enormous implications of the Fourth Circuit's decision is to suggest that the ruling is limited in scope because it is "painstakingly grounded on the particular circumstances of Hamdi's detention," (Br. in Opp. 13), and "carefully tailored to the detention of the battlefield combatant at issue in this case." *Id.* at 38. In fact, the Fourth Circuit's holding is entirely untethered to any facts that are particular to Mr. Hamdi's case.

Indeed, the Court of Appeals' ruling declined to engage in any inquiry into the factual basis for Mr. Hamdi's designation as an "enemy combatant" based on its fear that such an inquiry would violate the separation of powers between the branches of government. (Pet. App. 25a.) Because it engaged in "absolutely no judicial inquiry into the facts on the basis of which the government designated [Mr. Hamdi] as an enemy combatant," (Pet. App. 55a) (Luttig, J., dissenting from denial of rehearing), the Fourth Circuit's decision leaves American citizens who are allegedly found within a "zone of active combat" entirely vulnerable to unreviewable indefinite detention by the Executive branch.

Moreover, because the Fourth Circuit provided no definition of the term "zone of active combat," effectively leaving it up to the discretion of the Executive branch, the decision authorizes indefinite unreviewable detention of American citizens without charges by the Executive in almost any location that contains military forces or that is potentially subject to terrorist attack. In the case of another alleged "enemy combatant" seized within the United States, for example, Respondents contend that the entire United States is a battlefield. Nov. 17, 2003, Tr. at 89 l.15-19, *Padilla v. Rumsfeld*, No. 03-2235 (2d Cir. 2003) (attached); *accord* Mark Hamblett, *Tough Questions for U.S. on Detention*, Legal Times, Nov. 24, 2003, at 12. Furthermore, Respondents are already using the

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defendant free to return to his old ways.'") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Fourth Circuit's decision to argue against that petitioner's right to raise factual challenges to his detention and have access to counsel, and in support of deference to the Executive branch's "enemy combatant" determination in that case. Br. of Resp.-Appellant at 40-48, *Padilla v. Rumsfeld*, No. 03-2235 (2d Cir. 2003) (attached).

As Judge Luttig's dissent from the denial of rehearing makes clear, the Fourth Circuit's panel opinion neither rested upon an evaluation of the specific facts in the record nor accurately relied upon the habeas corpus petition to establish the location of Mr. Hamdi's seizure. (Pet. App. 56a-58a) (Luttig, J.).[3] Respondents' argument that the Fourth Circuit's decision is precisely limited in its scope, therefore, is an entirely inaccurate description of the ruling by the Court of Appeals.

II. The Court Of Appeals' Decision Is Inconsistent With This Court's Precedents

A. The Separation of Powers Does Not Preclude Article III Courts From Reviewing Military Seizures Made During Wartime

The foundation of the Fourth Circuit's ruling is that the separation of powers doctrine precludes the judiciary from inquiring into the propriety of the Executive branch's determination that Petitioner is an enemy combatant because he was purportedly seized within an active zone of combat incident to the Executive's exercise of its war powers.[4] But in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), this Court reviewed just such a decision with respect to a citizen's property. Specifically, the Court rejected the military's claim that it seized the plaintiff's property because "the

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[3] In fact, because Petitioner was not permitted access to counsel, he could not possibly make any legally dispositive concession as to the legality of his detention. *See* (Pet. App. 58a) (Luttig, J.); (Pet. App. 63a) (Motz, J.).

[4] The panel opinion's reliance on the location of Mr. Hamdi's seizure in the context of the separation of powers doctrine is a point that "neither party attempted to defend" below. (Pet. App. 54a) (Luttig, J.). For this reason, Petitioners had no occasion to cite *Mitchell v. Harmony* in the briefing before the Fourth Circuit.

plaintiff was engaged in trading with the enemy" within Mexico during the Mexican-American war. *Id.* at 132-33.

Respondents seek to distinguish *Harmony* on the ground that it involved a civil suit over the seizure of a citizen's property and that the action was brought "after the hostilities in Mexico had ended." (Br. in Opp. 31.) As an initial matter, this Court in *Harmony* did not rely upon the cessation of hostilities with Mexico as a prerequisite for judicial review any more than the court in *In re Territo* refrained from holding an evidentiary hearing before the official conclusion of World War II. *Compare In re Territo*, 156 F.2d 142 (9th Cir. 1946), *with Lee v. Madigan*, 358 U.S. 228, 230 (1959) (noting that official state of war with Germany concluded on October 19, 1951), and Treaty of Peace with Italy, Feb. 10, 1947, 61 Stat. 1245, 1369, 49 U.N.T.S. 3 (effective Sep. 15, 1947). Moreover, Respondents' arguments discounting *Harmony* would suggest that courts possess greater authority to review the seizure of a citizen's property in a damages action than to review the propriety of the seizure of the citizen himself by means of the Great Writ. If anything, the opposite is true. *Cf.* (Pet. App. 66a n.7) (Motz, J.) ("[T]he Supreme Court has never held that an American citizen becomes an 'enemy' and can be deprived of his liberty rights solely by virtue of residing in an enemy country during wartime.").[5]

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[5] Respondents' response to Petitioner's Suspension Clause claim is simply that "the shape of this habeas proceeding must reflect the unique circumstances in which it arises . . . ." Br. in Opp. at 22-23. As noted above, this circular argument rests upon Respondents' assertion that Mr. Hamdi is an enemy combatant, and ignores Petitioner's argument that the Suspension Clause preserves a broad scope of review in cases of executive detentions. In fact, federal courts have long entertained habeas corpus petitions by individuals alleged to be prisoners of war. *See In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946); *In re Fagan*, 8 F. Cas. 947, 949 (D. Mass. 1863) (No. 4,604) ("The writ of habeas corpus had long been in frequent use, in a great variety of cases. . . . [including those by] persons detained under military authority as soldiers or prisoners of war."); *In re McDonald*, 16 F. Cas. 17, 79 (E.D. Mo. 1861) (No. 8,751) (holding that Missouri militiaman seized by Union forces was entitled to seek relief by means of habeas corpus); *cf.* James McPherson, *Battle Cry of Freedom* 290-92 (1988) (describing battles between pro-southern Missouri militiamen and Union soldiers). What is important for purposes of Petitioner's claim, however, is not the type of relief that was

Nonetheless, the seizure of property by the military is just as integral to the war power as is the seizure of enemy soldiers. *See, e.g., Silesian-American Corp. v. Clark*, 332 U.S. 469, 475 (1947) ("There is no doubt but that under the war power, . . . the United States may confiscate enemy property."); *Lamar v. Browne*, 92 U.S. 187, 194 (1875) ("It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men."); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) ("War gives an equal right over persons and property."). And, this Court's decision in *Harmony* illustrates that the separation of powers doctrine does not preclude judicial review of a military seizure overseas that occurred during wartime. The Fourth Circuit's ruling to the contrary thus conflicts with that decision.

B. Whether a Citizen May Be Held as an Enemy Combatant Is Not a Political Question

Respondents' assertion that the determination as to whether Petitioner is an enemy combatant is a political question or a "quintessential military judgment," Br. in Opp. at 16, is squarely rejected by this Court's precedents. In fact, this Court made an independent determination that the petitioner in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), was not a prisoner of war.

In *Milligan*, like in this case, the military claimed that the location of seizure "in a military sense, constituted . . . the theatre of military operations . . . [because] Indiana had been and was again threatened with invasion by the enemy." 71 U.S. (4 Wall.) at 126. The military also maintained that Milligan was held as a prisoner of war. *Id.* at 131. Neither of these arguments, of course, precluded this Court from examining the circumstances in Milligan's case.

Hirota v. MacArthur, 338 U.S. 197 (1948) (Douglas, J., concurring), cited by Respondents, is entirely inapposite. In the aftermath of World War II, the President entered into an agreement with

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available under the common law but the scope of review applied to claims of executive detention.

the Allied Powers to establish an international military tribunal to try high military and civilian officials in the Japanese government for war crimes. Because the President had "made arrangements with other nations for [the petitioners'] trial," Justice Douglas concluded that "he act[ed] in a political role on a military matter." *Id.* at 209. Having been convicted by an international tribunal, the former Japanese officials and military officers therefore could not seek redress in United States courts.

Even in the context of an international war crimes tribunal, however, Justice Douglas stated that if the petitioners were American citizens, they would be able to seek habeas corpus review in a federal court. *Id.* at 205 ("I cannot believe that we would adhere to [the belief that the Court has no authority to review the judgment of an international tribunal] if these petitioners were American citizens. I cannot believe we would adhere to it if this tribunal or some other tribunal were trying American citizens for offenses committed either before or during the occupation."). In no way did Justice Douglas suggest that the classification of a citizen in a manner that would subject him to indefinite detention could ever be a political question.

Respondents also maintain that only the military is institutionally capable of making the determination regarding Mr. Hamdi's "enemy combatant" status. Br. in Opp. at 17. That is incorrect. As the Fourth Circuit acknowledged, "[t]he murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake." Pet. App. 24a. The logic of the court's statement not only undercuts Respondents' notion of their own institutional capability, but it also underscores the breathtaking nature of a Court of Appeals' opinion that—while acknowledging the potential for error—authorizes the unchallengeable and indefinite detention of citizens by the Executive.

Within the relatively secure context of the United States, the determination as to Mr. Hamdi's status should be fully reviewed by federal courts. Indeed, federal courts are perfectly able to evaluate evidence as to Mr. Hamdi's status. *See Milligan*, 71 U.S. (4 Wall.) at 131; *United States v. Lindh*, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002). Furthermore, independent factual inquiry by the judiciary is most important in a case like this in which the military has failed to implement its own military regulations—even after the District Court offered Respondents that opportunity (Pet. 9 n.7)—and denied Mr. Hamdi a hearing as to whether he is in fact an enemy combatant or simply a civilian who, for example, was turned over to the United States by the Northern Alliance for a bounty.[6]

C. The Court of Appeals' Decision Failed to Provide Constitutionally Adequate Access to the Courts

Respondents assert that Petitioners have raised an "access to courts" claim "[f]or the first time in this case" in the Petition for Certiorari, and that Petitioner has received constitutionally-adequate access to the courts. Br. in Opp. 33. Respondents are wrong on both counts.

Petitioners presented the precise argument contained in the instant Petition for Certiorari in Respondents' prior interlocutory appeal in this case challenging the District Court's order permitting counsel to have access to Petitioner. Br. of Pet'r's/Appellees at 14 n.5, *Hamdi v. Rumsfeld*, 296 F.3d

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[6] *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) (J.A. 91-126) ("EPW Regulations"). The EPW Regulations are designed to "implement international law," including the Geneva Convention Relevant to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 ("GPW"). EPW Reg. 1-1(b) (J.A. 95). Pursuant to these regulations, "[i]n accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." EPW Reg. 1-6 (J.A. 96.). Had the Executive branch followed the GPW and its own EPW Regulations requiring such a tribunal, the District Court, in reviewing Petitioner's detention, likely would have had access to much of the information it found necessary for meaningful judicial review.

278 (4th Cir. 2002) (No. 02-6895). Indeed, Petitioners cited both *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989), and *Ex parte Hull*, 312 U.S. 546, 549 (1941), in support of the argument that Mr. Hamdi was entitled by virtue of the Due Process Clause to access to courts. Accordingly, the issue remains available for review now that the case has been finally decided. *See United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). This has always been the rule in this Court. *See, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 283-84 (1897).

Moreover, Respondents' complaint that this claim was not developed below is disingenuous in light of the procedural history of this case. Following an interlocutory appeal in which the Fourth Circuit reversed a District Court order that required Respondents to grant Petitioner access to counsel, the Fourth Circuit remanded the case for further proceedings and directed the District Court to "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002). The Fourth Circuit plainly considered allowing Mr. Hamdi to have access to counsel an "intrusive measure" that was to be avoided. In fact, following the remand, the Fourth Circuit bluntly ordered the District Court to consider the sufficiency of the Mobbs declaration first as "an independent matter" before the district court considered any other questions in the case, including whether Petitioner should have access to counsel. (J.A. 149.)

Consequently, on remand, the District Court refused to consider any issues other than the sufficiency of the Mobbs Declaration. *See* Aug. 21, 2002, Order at 5-7 (J.A. 468-70) ("Despite this Court's reservations regarding the lawfulness of the Executive's unilateral determination of Hamdi's

status and his resulting indefinite detention, this Court declined to decide these issues in consideration of the Court of Appeals direction that this Court 'consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further.'"). The only issue addressed by the District Court and certified for interlocutory review thus involved the sufficiency of the Mobbs Declaration to support the detention, not the merits of Petitioner's claims.[7]

Nonetheless, during the latest interlocutory appeal—at oral argument as well as in the briefing before the Fourth Circuit—Petitioner continued to assert that Mr. Hamdi's imprisonment violated the Due Process Clause and that Mr. Hamdi must have the opportunity to have access to counsel and the courts. *See* Oct. 28, 2002, Tr. of Oral Argument before 4th Cir. ("If habeas corpus is to mean anything, it means that the man has to be given an opportunity to confront the allegations against him and it means that he should have counsel in order to do that.") (attached); Br. of Pet'r's/Appellees at 53, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) ("By imposing imprisonment, perhaps indefinitely, without process, Respondents continue to violate the Due Process Clause of the Fifth Amendment."). Nothing more was required to preserve this issue. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

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[7] The Court of Appeals therefore had no jurisdiction to consider any issues aside from those addressed by or fairly included within the District Court's August 16, 2002, Order. *United States v. Stanley*, 483 U.S. 669, 677 (1987) ("Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court . . ., that jurisdiction *is* confined to the particular order appealed from."); 9 Wright, Miller, & Cooper, *Fed'l Practice & Procedure* § 3929 (2d ed. 1996) ("Even more clearly the court of appeals will not consider matters not yet ruled upon by the district court."); 19 *Moore's Fed'l Practice* § 203.32[3][a] at 203-103 (3d ed. 1997) (same).

III. The Court of Appeals' Decision Is Contrary to a Congressional Statute, the Constitution, and Applicable Treaties and Regulations

A. Respondents assert that Congress has endorsed the indefinite and incommunicado detention of Mr. Hamdi, and that 18 U.S.C. § 4001(a) has no application to this case. Respondents are wrong.

As the Petition explains, § 4001(a) reflects a long-standing principle that the Executive branch possesses no unilateral authority to determine when citizens may be detained indefinitely without charge. Respondents' effort to limit the application of § 4001(a) ignores the plain language of the statute providing that "[n]o *citizen* shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." § 4001(a)(emphasis added). The unambiguous language of this statute, enacted in 1971, serves as the beginning and end of judicial construction. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002).[8]

Section 4001(a) explicitly prohibits the long-term detention of citizens "except pursuant to an Act of Congress," and no congressional act has authorized Mr. Hamdi's indefinite detention. Although Respondents and the Court of Appeals point to the general authorization for the use of force in Afghanistan and an appropriations provision related to prisoners of war, (Pet. App. 18a); (Br. in Opp. 27), neither of the statutes cited contain any language authorizing the indefinite detention of citizens. Respondents' argument that § 4001(a)'s "Act of Congress" requirement is satisfied by these statutes also makes little sense. Enacted in the wake of embarrassment over the treatment of Japanese-American citizens in the United States during World War II, § 4001(a) was

[8] The Executive has no authority outside of the criminal context to engage in the long-term detention of citizens. Because § 4001(a) simply reflects this longstanding principle, it can have no effect on the war powers. As for the statute's application overseas, this case does not present that question of statutory construction. *Cf. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

not designed to allow declarations of war, much less statutory authorizations for the use of force or appropriations provisions, to serve as a green light for the Executive to detain citizens.

Furthermore, Respondents fail to respond to the precedents evidencing this Court's rigorous scrutiny of statutes that purport to authorize military control over citizens. (Pet. 38-39.) Although Respondents correctly point out that *Ex parte Endo*, 323 U.S. 283, 297-98 (1944), did not involve "military law," i.e., challenges to "the jurisdiction of military tribunals," *id.*, neither does this case. This Court held in *Endo* that implicit powers drawn from statutes that are silent "on the power to detain" "must be narrowly confined to the precise purpose of" the statute, and that such powers can "place no greater restraint on the citizen than was clearly and unmistakably indicated by the [statutory] language." *Id.* at 300-02. Accordingly, neither the authorization for the use of force in Afghanistan nor an appropriation for prisoner of war facilities can be relied upon to suggest that Congress meant to sanction the indefinite and unreviewable detention of a citizen at issue here.

B. Even in the unlikely event that Congress by its authorization for the use of force in Afghanistan had authorized the military to detain citizens, it did nothing to take away Petitioner's right to challenge (1) the factual basis upon which his detention is predicated; (2) the imposition of punishment without process; and (3) the failure to afford Petitioner protections under the Geneva Convention Relevant to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 ("GPW"), and the military's EPW Regulations. Respondents assert that "the special context in which this case arises – wartime detention of combatants, not criminal punishment – significantly diminishes the due process rights that Hamdi enjoys." Br. in Opp. at 23. Once again, however, Respondents' argument rests upon their unilateral determination that Mr. Hamdi is an enemy combatant.

Regardless of the context in which this case arises, Petitioner cannot be deprived of the most basic procedural protection due, the opportunity to be heard, without eviscerating Petitioner's rights

under the Due Process Clause.[9] Moreover, Petitioner has been given few of the benefits afforded to prisoners of war that form the premise of Respondents' argument that his detention is a "simple war measure" and, as such, that it constitutes "neither punishment nor an act of vengeance." (Br. in Opp. 14) (quoting Pet. App. 16a.) Petitioner's "exclusion from human associations" itself has long been considered a "punishment of the most important and painful character," and a violation of the Due Process Clause. *See In re Medley*, 134 U.S. 160, 168-71 (1890).

Echoing the Fourth Circuit, Respondents contend that the GPW gives no protection to Petitioner because the treaty is non-self-executing. Respondents also argue that Mr. Hamdi is not entitled to a tribunal under Article 5 of the GPW because no doubt exists whether Mr. Hamdi is entitled to prisoner of war status. These arguments are meritless.

As the Petition (Pet.31 n.16) and amici[10] point out, the Fourth Circuit failed to recognize that 28 U.S.C. § 2241 itself provides a cause of action to seek redress for treaty violations.[11] Furthermore, the President's unilateral declaration that Taliban detainees are not entitled to GPW protections—a point that was not relied upon by the Fourth Circuit —does not establish that "no doubt" exists as to Petitioner's entitlement to the protections of the GPW. *See* George H. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 897-98

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[9] Respondents note that Petitioners "have made clear that they are not challenging Hamdi's initial capture and detention in Afghanistan." (Br. in Opp. 19.) The difference between such a claim and Petitioner's challenge to his indefinite detention is analogous to the difference between a Fourth Amendment challenge to the reasonableness of an initial seizure and a Fifth Amendment challenge to the lawfulness of a long-term deprivation of liberty.

[10] *See* Brief of *Amici Curiae* Former Prisoners of War and Experts on the Law of War in Support of Petitioners at 9-10.

[11] *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978), cited by Respondents (Br. in Opp. at 28) and the Fourth Circuit (Pet. App. 19a), is inapposite because the Sixth Circuit found that the plaintiffs could not assert claims under § 2241 until they had exhausted their state remedies. *Id.* at 633.

(2002). In any event, under U.S. regulations, "all persons detained by the United States Armed Forces receive prisoner of war protection regardless of whether they are entitled to prisoner of war status under the [Geneva Conventions]." Capt. Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, 1994 Army Lawyer 16, 17 (Aug. 1994) (citing EPW Regulations ¶ 1-5). Respondents are required by law to follow these regulations. *See* (Pet. 31 n.16) (quoting *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

The recent decision by the Department of Defense to allow Petitioner to have access to counsel is evidence that the prospect of review by this Court has had a salutary effect on the Executive's conduct. Unless this Court accepts review of this case, however, that effect will vanish—along with any prospect of a judicious and reasoned determination as to the propriety of Mr. Hamdi's indefinite detention.

IV Conclusion

The petition for a writ of certiorari should be granted.

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